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IN THE

Supreme Court of the United States

OCTOBER TERM 1949
No. 179

UNITED STATES OF AMERICA, Petitioner,

vs.

S.S. AUSTRALIA STAR *et al.*,
And Six Other Proceedings.

BRIEF FOR SIEMENS BROS. & CO., LTD., *ET AL.*, CARGO INTERESTS ON "AUSTRALIA STAR", RESPONDENTS.

IN OPPOSITION

JOHN C. PRIZER,
Counsel for Respondents Siemens Bros. & Co., Ltd., et al., cargo interests on "Australia Star".

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Statement

The petition gives a quite erroneous statement of the issue involved in the decision of the lower court holding the "P.C.616" at fault for the collision and predicating liability of the United States thereon. The petition on page 10 states:

> "The decision below, making the United States the supervisor of the proper navigation in wartime not only of all vessels escorted, but also of all vessels encountering them, is, we believe, of such far-reaching importance as to require review by this Court."

The issue before the lower courts in so far as concerns the liability of the "P.C.616" was not whether the colliding vessels navigated improperly and whether the "P.C.616" failed to supervise their navigation, but was solely whether the "P.C.616" herself was at fault with respect to duties that rested upon the "P.C.616" in the situation which preceded the collision.

The District Court in its opinion stated in substance that the "P.C.616" was at fault but that in contemplation of law she was a stranger owing no affirmative duty to either colliding vessel. At folio 1798 of the Record that court refers to the situation of "a vessel that merely happened on the scene".

The Court of Appeals, however, unanimously reached the opposite result, disagreeing with the District Court both in conclusions of fact and of law. In its opinion (p. 660) the Court of Appeals said:

> "With this view we disagree. *The Hindoo was subject to the orders of her naval escort. Pursuant to such orders she was proceeding, blacked out, on a prescribed course of 180° true, and she could reasonably expect to be warned of any danger known to her escort which would require a departure from such orders.** The commander of the PC-616 testified that it was his responsibility to get the Hindoo safely to her destination, and that 'It was my duty to do what in my judgment would safeguard the Hindoo.' He also admitted that he had authority to give an emergency war time order to any Allied merchant vessel. Nothing was offered by the United States to controvert this testimony as to the escort's duty. The escort's commander was aware of the danger

* Italics are ours.

to his escortee and of his own duty and authority to take measures to avoid it. But aside from the abortive attempt to signal the Australia Star and the directing of his searchlight on the Hindoo, at the last minute, he did nothing to avoid this collision. In our opinion this was negligence which contributed to the disaster."

The Facts and Issues

As the pertinent facts have been concisely and accurately stated in the brief for the S.S. "Australia Star" they need not be restated here. The brief for the petitioner seeks to give the impression by extraneous references to a 1949 communication from the Chief of Naval Operations to the Judge Advocate General and an "Escort Standard Sortie Order" bearing a United States Printing Office date of 1949, neither of which has any evidentiary connection with the case, that the sole duty of the "P.C.616" was to furnish escorted vessels with such protection as resulted from attacking submarines discovered in their vicinity. The case, however, must stand upon the evidence presented, which is very fairly summarized by the passage above quoted from the lower court's opinion. The evidence so summarized was not only uncontradicted in the Record, but is entirely consistent with the circumstances under which the "Hindoo" was being convoyed. The relationship of the "P.C.616" to the "Hindoo" was totally different from the relationship of a roving patrol boat accompanying a large convoy.

The argument of the petition relies heavily upon the findings of the District Court that neither the "Hindoo"

nor the "Australia Star" was induced by the presence of the "P.C.616" to navigate less carefully, and that the presence and action of the "P.C.616" put the "Australia Star" in no worse position than if the "P.C.616" were not there at all. Those findings, which are actually conclusions of fact, should be considered not only with reference to the testimony summarized by the Court of Appeals, but in the light of the District Court's own finding No. 10 (Record, p. 607), which contained the following statement:

> "Ten minutes before collision a green light was seen. The following minutes were consumed in a search in the signal code for the meaning of the green light, and the mistaken report that it was an aircraft warning signal from the PC-616."

Finding No. 10 is based upon the following testimony from the master of the "Hindoo":

> "A. Yes. I figured it was about 15 minutes after I came on the bridge and then I just searched the horizon, and then I saw the silhouette of the escort vessel.
>
> * * * * *
>
> Q. What was the next thing that you saw, Captain, and when? A. Well, later on, I would say about five minutes later, I saw a green light turning up in the same direction." (p. 459, fols. 1376-7)
>
> * * * * *
>
> "A. Well, I was waiting for another signal because they told me that green light was from the escort and it used to wait a few moments so it could switch other lights on. But when it didn't come, I told the third mate to go in and look up in the signal book what that signal means, and he came out and told me that the signal meant an aircraft is approaching." (p. 460, fol. 1378)

As stated by the Court of Appeals, the "Hindoo" was steering the course and proceeding at the rate of speed ordered by the "P.C.616", was blacked out in accordance with instructions enforced by the "P.C.616", and kept the "P.C.616" under observation for the purpose of receiving emergency orders from her. Since the "P.C.616" was equipped with radar and the "Hindoo" was not so equipped, the latter had to rely upon the "P.C.616" to inform her of invisible dangers whether those dangers were caused by hostile aircraft or friendly blacked out vessels. Consequently, when, without warning, the navigators of the "P.C.616" saw the green light of the "Australia Star" come into view in approximately the same relative position off their port bow in which they had last seen the "P.C.616", it was not entirely surprising that the navigators of the "Hindoo" mistook the green light for a signal from the "P.C.616". Far from being an outsider to the collision, the presence and relationship of the "P.C.616" to the "Hindoo" actually misled the "Hindoo" and contributed to the collision.

The petition on page 13 makes the following statement:

> "The sole duty assumed by the P.C.616, and the only reason for its presence, was the military obligation to protect the Hindoo from enemy attack."

That statement is apparently not intended to apply uniquely to the present case since it is contrary to the evidence in the present case, but appears by its context to have application to all wartime convoy situations. The following hypothetical case is suggested as a test of the principle contended for in the petition:

Suppose two large convoys proceeding in opposite directions, blacked out, meeting head and head. Suppose each convoy to be escorted by a vessel proceeding ahead and giving explicit orders as to the course and speed to be maintained by the vessels in its convoy. Suppose further, that none of the merchant vessels in either convoy is equipped with radar but that each escorting vessel is equipped with an efficient radar and that the navigating officers on each escorting vessel have full knowledge of the convoy approaching from the opposite direction. Assume that neither escort vessel gives any orders to the vessels in its convoy for a change of course and gives no warning of the convoy approaching from the opposite direction. Assume that the vessels in the two convoys meet head and head and that collisions occur between them.

Would it be held, in the hypothetical case just stated, that neither escorting vessel was to blame for the collision and that the only duty of each escort in the circumstances was to protect its convoy from enemy submarines?

The issue in the present case, just as the issue in the hypothetical case stated, is an issue of fact. In the case *of Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, this court held the United States liable under the Public Vessels Act, 46 U.S.C.A. Section 781, et seq. for its failure properly to perform its duty to set a safe course for the vessel which was under orders to follow the course set. It is true that the analogy of tug and tow does not have application to the relationship that existed between the "P.C.616" and the "Hindoo". Nevertheless, the conditions and oral instructions from the "P.C.616" under which the

"Hindoo" was proceeding, made the latter vessel peculiarly dependent upon the orders from her escort. The present case does not involve a broad principle of an escorting vessel's liability for the navigation faults of her convoy any more than the *Canadian Aviator, Ltd.* v. *United States, supra,* involved such a principle. The only question involved is the relationship which existed between the vessels under the evidence of the present case and the duties devolving upon the "P.C.616" out of that particular relationship. Admittedly the "P.C.616" permitted the "Hindoo" to proceed without warning into collision, although knowing that the "Hindoo" was proceeding blacked out under orders from the "P.C.616", on a course and at a speed set by the "P.C.616", and that the "Hindoo" was keeping the "P.C.616" under observation for any change of course, and further knowing for a considerable time before the collision that unless the "Hindoo" made an alteration in her course and speed a collision would occur.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN C. PRIZER,
Counsel for Respondents Siemens Bros. & Co., Ltd., et al., cargo interests on "Australia Star".

Dated New York, August 18, 1949.